United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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NO. 75-4117

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

ON PETITION FOR REVIEW

BRIEF FOR THE RESPONDENT

PETER R. TAFT,
Assistant Attorney General.

RAYMOND N. ZAGONE,
KATHRYN A. OBERLY,
Attorneys, Department of Justice,
Washington, D. C. 20530.

Of counsel:

JANET E. LABELLA,
JEAN W. SUTTON,
Attorneys, Environmental Protection Agency,
Region I,
Boston, Massachusetts 02203.

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JURISDICTION

This Court's jurisdiction over the petition for review rests on Section 307(b)(1) of the Clean Air Act Amendments of 1970, 84 Stat. 1707, as amended, 42 U.S.C. sec. 1857h-5(b)(1), the petition having been filed within 30 days after the Administrator's promulgation of an implementation plan applicable to sources owned, operated or under contract with the Connecticut Transportation Authority

QUESTIONS PRESENTED

1. Whether a private right of action exists for enforcement of Executive Order No. 11821, which provides that

federal agencies proposing "major" rules or regulations should certify to the Council on Wage and Price Stability that the inflationary impact of the proposal has been evaluated.

2. Assuming that agency compliance with Executive Order No. 11821 may be judicially reviewed, whether promulgation by the Administrator of the Environmental Protection Agency of an implementation plan applicable to air pollution sources owned, operated or under contract with the Connecticut Transportation Authority, and designed to attain, maintain and enforce national ambient air quality standards, is a "major" regulation requiring an "inflation impact statement."

3. Whether the Administrator's implementation plan should be invalidated because of the Administrator's allegedly inaccurate summarization of comments made at the public hearing which preceded promulgation of the plan.

4. Whether the Administrator's implementation plan should be set aside because of the Administrator's alleged failure to consider "other environmental factors" which might result from adoption of the plan.

STATUTES INVOLVED

Pertinent provisions of the Clean Air Act Amendments of 1970, 84 Stat. 1707, as amended, 42 U.S.C. sec. 1857 et seq., are reproduced as Appendix A to this brief.

STATEMENT

The Trustees of the Penn Central Transportation Company (hereafter referred to as Penn Central) seek review of a regulation promulgated by the Administrator of the Environmental Protection Agency (EPA), which provides that sources of air pollution owned, operated or under contract with the Connecticut Transportation Authority (CTA) are, as a matter of federal law, subject to the provisions of the Connecticut plan for the implementation of national ambient air quality standards, as required by the Clean Air Act Amendments of 1970, 42 U.S.C. sec. 1857 et seq. The events leading to the Administrator's promulgation of this regulation are as follows.

Pursuant to Section 110 of the Clean Air Act, as amended, 42 U.S.C. sec. 1857c-5, each State is required to adopt and submit to the Administrator an implementation plan providing for the attainment, maintenance and enforcement of the national "primary" and "secondary" ambient air quality standards promulgated by the Administrator. National primary standards are air quality standards that, in the Administrator's judgment, are "requisite to protect the public health," while secondary standards are those "requisite to protect the public welfare." Section 109(b)(1) and 109(b)(2), 42 U.S.C. sec. 1857c-4(b)(1) and 1857c-4(b)(2). The Administrator must approve or disapprove a state implementation plan (SIP) within four months of its

submission. Section 110(a)(2), 42 U.S.C. sec. 1857c-5(a)(2). If he determines that the plan meets the requirements of Section 110(a)(2)(A)-(H), 42 U.S.C. sec. 1857c-5(a)(2)(A)-(H), he is required to approve the plan. If he finds the state plan deficient, he must disapprove it and, after giving the State an opportunity to revise the plan, propose and promulgate his own regulations correcting the deficiency. Section 110(c), 42 U.S.C. sec. 1857c-5(c). 1/

In accord with Section 110, the State of Connecticut submitted its implementation plan, which was approved by the Administrator on May 31, 1972 (37 Fed. Reg. 19842). EPA's approval of the plan was based on the assumption (an assumption which was at that time shared by the State of Connecticut's Department of Environmental Protection) that the plan applied to all sources of air pollution within the State, including those owned, operated or under contract with the Connecticut Transportation Authority.

Subsequently, the Supreme Court of Connecticut ruled that Section 16-344 of the Connecticut General Statutes exempted facilities owned, operated or under contract with the Connecticut

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1/ An implementation plan that either is promulgated by the State and approved by the Administrator, Section 110(a), 42 U.S.C. sec. 1857c-5(a), or is promulgated by the Administrator, Section 110(c), 42 U.S.C. sec. 1857c-5(c), becomes the "applicable implementation plan," Section 110(d), 42 U.S.C. sec. 1857c-5(d), which is enforceable by the Administrator. Section 113, 42 U.S.C. sec. 1857c-8 .

Transportation Authority from all state regulation, including the state implementation plan. Town of Greenwich v. Connecticut Transportation Authority, 348 A.2d 596 (Conn. 1974). Penn Central's Cos Cob power plant, located in Greenwich, Connecticut, generates electric power at 25 cycles per second to operate rail service between New Haven and New York. The plant is owned by Penn Central, leased to the Connecticut Department of Transportation (CDOT), [2/] and operated by the Consolidated Rail Corporation (ConRail). It is undisputed that the plant is a substantial source of particulate emissions within Connecticut; [3/] however, the state supreme court decision clearly exempted it from compliance with the Connecticut SIP.

Of the eight criteria which the Administrator must determine will be satisfied by a proposed SIP (Section 110(a)(2)(A)-(H), 42 U.S.C. sec. 1857c-5(a)(2)(A)-(H)), the one

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2/ The Connecticut Department of Transportation is the parent agency of the Connecticut Transportation Authority. The two names are used interchangeably throughout this brief.

3/ See, e.g., App. 20-21; R. Doc. 10, 15, 50, 51. "R. Doc." refers to the document number as set forth in the Certified Index to the Record. In this brief, we refer the Court only to documents reproduced in the Appendix; unfortunately, however, the Appendix is not fully paginated and thus citation to the document number is the only means of identification.

The Cos Cob plant, which is clearly obsolete, has been the subject of pollution complaints going back as far as 1938. R. Doc. 55.

relevant to this case is contained in Section 110(a)(2)(F)(i), 42 U.S.C. sec. 1857c-5(a)(2)(F)(i). That subsection requires the Administrator to determine that the SIP provides "necessary assurances that the State will have adequate personnel, funding, and authority[4/] to carry out such implementation plan." (Emphasis added.)

4/ In furtherance of this section, the Administrator has provided by regulation (40 C.F.R. sec. 51.11) as follows:

> (a) Each plan shall show that the State has legal authority to carry out the plan, including authority to:
>
> (1) Adopt emission standards and limitations and any other measures necessary for attainment and maintenance of national standards.
>
> (2) Enforce applicable laws, regulations, and standards, and seek injunctive relief.
>
> (3) Abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons, i.e., authority comparable to that available to the Administrator under section 303 of the Act.
>
> (4) Prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard.
>
> (5) Obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require

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Clearly, the Connecticut Supreme Court decision made it impossible for the State to satisfy the legal authority requirements of an SIP. Accordingly, EPA determined pursuant to Section 110(c), 42 U.S.C. sec. 1857c-5(c), that federal regulation would be required to control emissions from sources of air pollution affected by the state court's decision, including the Cos Cob power plant. On January 16, 1975, EPA published a notice of proposed rulemaking, stating that the Administrator intended to disapprove the Connecticut SIP insofar as the State lacked the necessary legal authority to regulate CTA facilities and to substitute as federal law regulations identical to the Connecticut plan, but specifying that those regulations would apply to facilities owned, operated or under

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> recordkeeping and to make inspections and conduct tests of air pollution sources.
>
> (6) Require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also authority for the State to make such data available to the public as reported and as correlated with any applicable emission standards of limitations.

contract with CTA (40 Fed. Reg. 2832). The notice of proposed rulemaking also stated that a public hearing would be held on February 11, 1975, in Greenwich, Connecticut, to receive comments on the proposed regulation.

Following the hearing and the receipt of written comments, the Administrator promulgated a final regulation on May 29, 1975 (effective June 30, 1975), which provides as follows (40 C.F.R. Part 52, Subpart H; App. 3-4):

> 1. Section 52.377 is amended by adding a new paragraph (b) as follows:
>
> § 52.377 Legal authority.
>
> * * * * *
>
> (b) The requirements of § 51.11(a) of this chapter are not met because the State does not have the legal authority to enforce approved implementation plan regulations against facilities owned, operated, or under contract with the Connecticut Transportation Authority.
>
> 2. A new § 52.380 is added, as follows:
>
> § 52.380 Rules and regulations.
>
> (a) All facilities owned, operated or under contract with the Connecticut Transportation Authority shall comply in all respects with Connecticut Regulations for the Abatement of Air Pollution sections 19-508-1 through 19-508-25 inclusive, as approved by the Administrator.
>
> (b) For the purposes of subsection (a) of this section the word "Administrator" shall be substituted for the word "Commissioner" wherever that word appears in Connecticut Regulations for the Abatement of Air Pollution Sections 19-508-1 through 19-508-25 inclusive, as approved by the Administrator.

On June 19, 1975, Penn Central filed this petition for review of the regulation, alleging that its promulgation was invalid because the Administrator (1) failed to file an inflation impact statement as required by Executive Order No. 11821; (2) misrepresented the substance of comments made at the February 11, 1975, public hearing; and (3) failed to consider the effect of the regulation on the environment.

The effect of these three claims on the validity of the Administrator's regulation is the only matter now before the Court; however, a brief description of events occurring subsequent to the promulgation of the regulation is necessary for a complete understanding of the issues before the Court. Contrary to petitioners' apparent understanding at the time (see, e.g., App. 24-26), the promulgation of the regulation itself did not mean that the Cos Cob plant must immediately cease operations. Instead, once the Administrator discovered that the plant was operating in violation of the applicable implementation plan, he initiated an administrative enforcement proceeding against CDOT and Penn Central, pursuant to Section 113(a)(1), 42 U.S.C. sec. 1857c-8(a)(1). 5/ If, as he did here,

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5/ Federal enforcement proceedings are governed by Section 113, 42 U.S.C. sec. 1857c-8. Section 113(a)(1) provides:

> Whenever * * * the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, * * * the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

the Administrator chooses to issue an order rather than to proceed directly with a civil action, Section 113(a)(4) provides that such order will not take effect "until the person to whom it is directed has had an opportunity to confer with the Administrator concerning the alleged violation." Further, the order must "specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

Following conferences between EPA and Penn Central pursuant to Section 113(a)(4), the Administrator issued an enforcement order on January 7, 1976, which adopted CDOT's and Penn Central's own proposal for bringing the Cos Cob plant into compliance with the applicable regulations. The order calls for CDOT and Penn Central to convert from Cos Cob-supplied power to commercially available 60 hertz traction power and 100 hertz signal power, thus rendering the Cos Cob plant unnecessary for operation of the railroad and permitting it to be shut down. Completion of the conversion program is to be accomplished by September 15, 1978. The order also establishes interim deadlines for completion of certain percentages of the total work (e.g., 9% to be completed by June 30, 1976) and provides for inspections and monitoring.

ARGUMENT

I

THE ADMINISTRATOR'S IMPLEMENTATION PLAN SHOULD NOT BE INVALIDATED FOR AN ALLEGED FAILURE TO COMPLY WITH EXECUTIVE ORDER NO. 11821

A. Executive Order No. 11821 does not create a private right of action. -- In arguing that the implementation plan should be set aside because of the Administrator's failure to issue an inflation impact statement (IIS) under Executive Order No. 11821, petitioners analogize to the environmental impact statement requirement of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. sec. 4332(2)(C). It is clear, however, that the substantial body of NEPA case law has no bearing on the enforcement of an Executive Order. Unlike NEPA, which contemplates a significant role for the judiciary, the enforcement of Executive Order No. 11821 should be left to the President of the United States; it is not an appropriate matter for judicial resolution. The Court of Appeals for the Eighth Circuit has so held, concluding that Executive Order No. 11821 did not create a private right of action (Independent Meat Packers Ass'n. v. Butz, 526 F.2d 228, 235-236 (C.A. 8, 1975)):

> [I]n our view, Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action. See Kuhl v. Hampton, 451 F.2d 340, 342 (8th Cir. 1971) (per curiam); Manhattan-Bronx Postal Union v. Gronouski,

> 121 U.S.App.D.C. 321, 350 F.2d 451 (1965). Even if appellees could show that the order has the force and effect of law, they would still have to demonstrate that it was intended to create a private right of action. See Acevedo v. Nassau County, 500 F.2d 1078, 1083-84 (2d Cir. 1974); Kuhl v. Hampton, supra at 342; Farkas v. Texas Instrument, Inc., supra at 632-33; Farmer v. Philadelphia Electric Co., supra at 9; see also Gnotta v. United States, supra at 1275. Executive Order No. 11821 does not expressly grant such a right. To infer a private right of action here creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.
>
> In summary, we conclude that the President did not undertake or intend to create any role for the judiciary in the implementation of Executive Order No. 11821. We hold, therefore, that the district court erroneously set aside the revised regulations in their entirety because of alleged deficiencies in the impact statement. (Footnotes omitted.)

Although this Court has not had occasion to consider Executive Order No. 11821, it recently reached an identical conclusion with respect to Executive Order No. 11512 (Planning, Acquisition and Management of Federal Space). In Acevedo v. Nassau County, 500 F.2d 1078, 1083-1084 (C.A. 2, 1974), the Court stated:

> Even if appellants could pass the constitutional test of standing, they would still have to show that the Executive Order, regulation, or Memorandum of Understanding were intended to create private rights of action. None of them expressly grants such a right. Of course, such may be inferred when necessary to effectuate the purposes of a statute or regulation. See J.I. Case Co. v. Borak, 377 U.S. 426, 431-434, 84

> S.Ct. 1555, 12 L.Ed.2d 423 (1964). But where the source of the statute or regulation has been silent, courts do not likely infer such rights. In this case we see no need to find an implied private right of action that would extend to appellants. The obligations created by the Executive Order, Memorandum of Understanding, and GSA regulations are so broad and vague that inferring a private right of action in them would create a strong possibility of protracted lawsuits brought by persons with little at stake before any federal facility could be constructed. We decline to authorize such a result. (Footnote omitted.)

In the same vein is Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 457 (C.A. D.C. 1965), cert. den., 382 U.S. 978:

> If appellants disagreed with the Postmaster General's decision as to this aspect of personnel policy, and believed it to be contrary to the President's wishes, it is obvious to whom their complaint should have been directed. It was not to the judicial branch. Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees.

Executive Order No. 11821, like the order in Manhattan-Bronx Postal Union, and unlike NEPA, "represents in essence a formulation of broad policy by the President"--in this case a policy of curbing inflation. It has "no specific foundation in Congressional action" and it is not "required to effectuate any statute." It may be "withdrawn at any time for any reason." The President "did not undertake to create any role for the

judiciary" in its implementation. The order is, essentially, an internal management and information-gathering tool of the Executive Branch, compliance with which should be monitored by the Chief Executive and not the courts. 6/

B. The Administrator's action did not require the preparation of an inflation impact statement. -- Even if the courts were empowered to enforce Executive Order No. 11821, it is clear that the Administrator did not violate its terms. We begin our discussion with a brief description of the order and regulations promulgated thereunder.

Executive Order No. 11821 was issued by President Ford on November 27, 1974 (App. 10-11). Section 1 of the order requires agencies proposing "major" rules or regulations to make an "evaluation" of the "inflationary impact" of the proposals "in accordance with criteria and procedures established pursuant to this order." It also requires agencies to accompany any such major rule or regulation with a "statement which certifies that the inflationary impact of the proposal has been evaluated." Section 2(a) delegates to the Director of the Office of Management and Budget (OMB) the power "to develop criteria for

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6/ As this Court noted in Acevedo, supra, 500 F.2d at 1082-1083, and the Eighth Circuit noted in Independent Meat Packers, supra, 526 F.2d at 236, it is doubtful whether petitioners have standing to challenge an agency's compliance with Executive Order No. 11821. Penn Central cannot satisfy the "zone of interests" test since the order is designed not for the benefit of private parties, but "to help implement the President's personal economic policies." 526 F.2d at 236 n. 21.

the identification of major legislative proposals, regulations, and rules" and to "prescribe procedures for their evaluation."

Pursuant to Section 2(a) of the Executive Order, the Director of OMB issued Circular No. A-107 on January 28, 1975 (App. 14-18). Section 4(a) of the Circular called upon federal agencies to "develop procedures for the evaluation" of significant proposals. The OMB Circular also provided in Section 6(c) that interim criteria developed by the agencies themselves would be applicable until OMB approved the final criteria submitted by each agency. In accordance with this directive, EPA issued interim criteria on February 24, 1975, designed to determine which EPA actions would require a certification that their inflationary impact had been evaluated (App. 39-41). On November 12, 1975, OMB approved EPA's final criteria. (A copy of EPA's final guidelines is attached to this brief as Appendix B.)

1. The implementation plan at issue is not a "major" regulation under EPA's interim guidelines. -- EPA's interim guidelines were, by virtue of Section 6(c) of the OMB Circular, the only criteria applicable to the Administrator's promulgation of the plan, since EPA's final guidelines were not effective until well after the plan's promulgation. 7/ The interim

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7/ Penn Central's contention (Br. 3-4) concerning the fact that as of the February 11, 1975, public hearing, no IIS had been prepared, is misplaced. There is no requirement in the Executive Order that a hearing be held on the IIS. Moreover, the hearing which was held in this case was not adjudicatory in

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guidelines provided (App. 40):

> Only actions that are likely to result in capital investment exceeding $100 million or annualized costs (including capital costs) of $50 million will require certification.

Assuming, arguendo, that petitioners' figure of $68 million for the cost of converting to commercial power is accurate (Br. 4), it is evident that no IIS was required because the capital investment is less than $100 million. 8/ Petitioners try to inflate this figure by hypothecating about the costs which might be incurred by the immediate closure of the Cos Cob plant, such as the effect on New York City businesses, which petitioners allege would lose 30,000 employees, and the effects on the employees themselves, who might be forced to quit their jobs if commuter rail service is unavailable. Petitioners overlook the fact that it is not now, nor has it ever been, EPA's intention to terminate commuter rail service. This is evident from the enforcement order issued by the Administrator which, by allowing Penn Central until September 1978 to convert to a new source of power, will cause no interruption in rail service whatsoever.

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nature; it served only an information-gathering function. Thus, assuming an IIS were required, the Administrator could have issued it at any time prior to final promulgation of the regulation (May 29, 1975). We also note parenthetically that it is not surprising that the hearing officer, who has no responsibility for IISs in any event, was not familiar with Executive Order No. 11821. OMB's Circular had only issued some two weeks before the hearing.

8/ We note here that it is not petitioners' $68 million we are talking about. The conversion program is to be financed through a federal grant from the Urban Mass Transit Administration.

Furthermore, it is doubtful whether the $68 million conversion cost should be attributed to EPA. The Administrator's implementation plan includes, inter alia, emission limitations necessary to attain and maintain the national ambient air quality standards (See Section 110(a)(2)(B), 42 U.S.C. sec. 1857c-5(a)(2)(B).) It does not, however, dictate the method which must be used to achieve compliance with the plan; rather, that choice is left to the pollution source itself. See S. Rept. No. 91-1196, 91st Cong., 2d sess. (1970) p. 17. In this case, conversion to commercially available power, thereby allowing the Cos Cob plant to be shut down, is, of course, one means of complying with the implementation plan. It is not, however, the only means. For example, the existing plant could be brought into compliance by installing additional electrostatic precipitators, by replacing the existing turbines with electric motors, or by converting the existing coal-fired boilers to heavy fuel oil. All of these alternatives would cost substantially less than $68 million--generally in the neighborhood of $2 to $4 million. 9/ Petitioners could have chosen any one of them

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9/ See affidavit of Roy Gamse (App. 38). It should be noted that the agency may decide no IIS is required without going through the rather elaborate "negative assessment" procedures which have developed as a concomitant to NEPA's EIS requirement (see Hanly v. Mitchell, 460 F.2d 640 (C.A. 2, 1972), cert. den., 409 U.S. 990; Hanly v. Kleindienst, 471 F.2d 823 (C.A. 2, 1972), cert. den., 412 U.S. 908; Hanly v. Kleindienst, 484 F.2d 448 (C.A. 2, 1973), cert. den., 416 U.S. 936). EPA's final guidelines on IISs, approved by OMB, provide in Section 3 that even in the absence of specific cost estimates, if one can "safely judge" that the threshold is not met, no IIS is required. This is exactly what Mr. Gamse did in his affidavit.

as a means of compliance. Thus, the enforcement order specifies conversion to commercially available power not because of any insistence by EPA on that method, but because petitioners wish to rid themselves of what is clearly an obsolete generating plant.

2. No IIS would be required under EPA's final guidelines. -- Although the need for an IIS must in this case be judged according to EPA's interim criteria, it is instructive to note that under the final guidelines, approved by OMB on November 12, 1975, the Administrator's promulgation of the challenged regulation is clearly not a "major" rule or regulation. The final guidelines specify a $100 million annualized cost threshold; 10/ in addition, they provide greater guidance about actions not intended to be covered by the IIS requirement.

10/ The final guidelines thus have a higher threshold than the interim criteria, which specified $100 million in capital investment or $50 million in annualized costs. The final guidelines do not put a floor on capital investments, but simply require $100 million in annualized costs.

Thus, Section 9 provides that actions "which only serve to enforce prior legislation or regulations, without themselves levying significant new spending requirements, will not require IIS's." We remind the Court of the reason for the Administrator's promulgation of the regulation at issue--when EPA learned that the Connecticut SIP, which was approved by the Administrator in 1972, would not apply to Cos Cob, the Administrator merely promulgated as federal law regulations identical to the Connecticut SIP. We submit that the Administrator's action in remedying a defect in state law, so that the SIP could be applied as Connecticut and EPA had originally intended, is not a "major" regulation under Section 9.

In summary, there is no possible theory under which the failure to file an IIS could serve as a basis for invalidating the Administrator's implementation plan.

II

THE ADMINISTRATOR'S ADOPTION OF THE IMPLEMENTATION PLAN APPLICABLE TO PETITIONERS WAS NEITHER ARBITRARY NOR CAPRICIOUS

Penn Central claims that the implementation plan is invalid because the regulation is based in part upon an allegedly inaccurate and erroneous premise which was stated in the preamble to the notice of final rulemaking. The contention is frivolous. The preamble provides, in pertinent part (40 Fed. Reg. 23280):

> No person appearing at the hearing, or submitting testimony subsequently opposed the disapproval of the state implementation plan or the substitution of the proposed regulation by the Administrator. Representatives of the Connecticut Transportation Authority and of the Penn Central Transportation Company appeared, presented plans for the phasing out of the Cos Cob Generating Plant and asked for a delay in the implementation of the regulation.

Contrary to Penn Central's assertion (Br. 10), neither the testimony presented by Mr. Kenneth Lundmark of Penn Central (App. 19-26) nor by Mr. William Lynch of CDOT (R. Doc. 52) opposed the adoption of the implementation plan. Mr. Lundmark suggested that EPA make further inquiries to ascertain the "reasonable earliest target date for the conversion [and shut down] of the plant" prior to promulgating

the final regulation (App. 22). Mr. Lynch concluded his remarks by stating, "Connecticut, therefore, respectfully asks that implementation of the proposed regulation be delayed until December 31, 1976" (R. Doc. 52). Thus, the preamble summarized their comments precisely.

Moreover, we submit that a careful reading of both gentlemen's testimony indicates their fundamental misunderstanding of the effect of the promulgation of the plan. Each testified at length concerning the dire consequences of an immediate cessation of rail service. See App. 23-26 and R. Doc. 52. We cannot stress too strongly that the adoption of the implementation plan itself did not compel that result and we refer the Court again to EPA's enforcement order which allows Penn Central until September 1978 to accomplish the conversion program.[11/] Thus, while petitioners clearly opposed immediate shutdown, they did not oppose the implementation plan; if they did oppose the plan, it is only because they did not understand its import.

11/ It is apparent to us that Penn Central's real complaint is not with the implementation plan, but with the enforcement order, and then only because it now appears that Penn Central will be unable to meet the compliance deadlines. Clearly, however, this is the wrong forum in which to litigate these matters; this Court's jurisdiction only extends to review of the underlying plan. If the Administrator determines that Penn Central is not complying with the enforcement order, he may commence a civil action in district court. Section 113(b), 42 U.S.C. sec. 1875c-8(b). Presumably, Penn Central's reasons for noncompliance, if any, would be relevant in determining the appropriate remedy to be ordered by the district court.

Assuming, arguendo, that the testimony is susceptible to the interpretation proffered by Penn Central, an error of this sort could not invalidate the regulation. It is not the validity of the preamble which this Court must decide, but rather the plan itself. Clearly, the validity of the plan does not turn on the support of the regulated parties, as petitioners apparently argue, but on rationality. Bowman Transportation Co. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285, 290 (1974). And, petitioners are simply in error when they state (Br. 10) that the plan must be judged against the substantial evidence test. On the contrary, the courts of appeals have been unanimous in holding that the Administrator's approval or adoption of an implementation plan will be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of 5 U.S.C. sec. 706(2)(A). That standard has been well stated by the Court of Appeals for the First Circuit in South Terminal Corp. v. EPA, 504 F.2d 646, 655 (1971):

> In providing for review of an implementation plan under the Clean Air Act by courts of appeals, Congress did not lay down standards beyond those already

> established in the Administrative Procedure Act (APA). The latter standards, appearing in 5 U.S.C. § 706, are controlling. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413, 91 S.Ct. 814, 28 L.Ed.2d 136 (1970); Texas v. EPA, 499 F.2d 289, at 296 (5th Cir. 1974). Under § 706, we must determine whether EPA followed lawful procedures in evolving its plan; whether it acted within its statutory authority; and whether the plan is constitutional. If so, we must set aside the plan only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". 5 U.S.C. § 706(2)(A).

See also Union Electric Co. v. EPA, 515 F.2d 206, 214 (C.A. 8, 1975), aff'd, S. Ct. No. 74-1542 (June 25, 1976); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 666 (C.A. D.C. 1975); NRDC v. EPA, 507 F.2d 905 (C.A. 9, 1974); Citizens for Clean Air, Inc. v. EPA, 480 F.2d 972, 975-976 (C.A. 3, 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 505-507 (C.A. 4, 1973).

Petitioners have never attacked the merits of the plan itself, nor could they. The information produced at the public hearing and otherwise before the Administrator is more than sufficient to support promulgation of the plan. See, e.g., R. Docs. 55-76.

III

NO ADDITIONAL CONSIDERATION OF "OTHER ENVIRONMENTAL FACTORS" IS REQUIRED IN THIS CASE

Penn Central's final argument is that the Administrator failed to consider other environmental impacts which may be caused by the plan. The "other environmental factors" which Penn Central contends the Administrator overlooked are not specified, but from Penn Central's statements about encouragement of mass transit and the air pollution problems caused by motor vehicle traffic (Br. 10-11), it is obvious that Penn Central again assumes that the effect of subjecting it to the challenged regulation will be to shut down rail service, causing a dramatic increase in the number of private automobiles travelling between New Haven and New York City. We have already demonstrated that such an assumption is an unwarranted distortion of the facts. 12/

In any event, to the extent that specific consideration of other environmental factors is required, assessment of the general impact of the regulation was part of the review process preceding the Administrator's approval of the original Connecticut SIP. See Anaconda Co. v. Ruckelshaus, 482 F.2d 1301

12/ In addition to the enforcement order, the Agency's concern for encouraging mass transit and reducing air pollution caused by automobiles is evidenced by EPA's continuing efforts to work with the State of Connecticut in developing a Transportation Control Plan.

1306 (C.A. 10, 1973). 13/ It must be remembered that the regulation at issue is state-initiated. EPA's promulgation of the plan in order to cure a legal defect in Connecticut's enforcement authority should not obscure the fact that the regulation is part of Connecticut's chosen strategy for attaining and maintaining the national ambient air quality standards. The Supreme Court has clearly held that the wisdom of a State's choices in this area should not ordinarily be questioned by EPA. Union Electric Co. v. EPA, S.Ct. No. 74-1542 (June 25, 1976) slip op. at 18; Train v. NRDC, 421 U.S. 60, 79 (1975).

13/ Penn Central's citation of 42 U.S.C. sec. 1857c-5(c)(2)(A), which was added to the Clear Air Act by the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 256, proves too much. If the cited language is relevant, even peripherally, it demonstrates that Congress did not contemplate a detailed consideration of possible indirect environmental effects by the Administrator prior to his approval or promulgation of implementation plans. That Congress felt it necessary to specifically require a study on the need for regulations requiring parking surcharges, management of parking supply, or preferential bus/carpool lanes, clearly suggests that such studies are not contemplated or required for elements of an implementation plan unrelated to transportation controls.

CONCLUSION

For the foregoing reasons, the Administrator's promulgation of the implementation plan applicable to sources owned, operated or under contract with the Connecticut Transportation Authority should be upheld.

Respectfully submitted,

PETER R. TAFT,
Assistant Attorney General.

RAYMOND N. ZAGONE,
KATHRYN A. OBERLY,
Attorneys, Department of Justice,
Washington, D. C. 20530.

Of counsel:

JANET E. LABELLA,
JEAN W. SUTTON,
Attorneys, Environmental Protection Agency,
Region I,
Boston, Massachusetts 02203.

JULY 1976

90-5-2-3-680

THE CLEAN AIR ACT AMENDMENTS OF 1970, AS AMENDED (PERTINENT EXCERPTS)

TITLE I—AIR POLLUTION PREVENTION AND CONTROL [1]

FINDINGS AND PURPOSES

"SEC. 101. (a) The Congress finds—

"(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

"(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property and hazards to air and ground transportation;

"(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

"(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional and local programs to prevent and control air pollution.

"(b) The purposes of this title are—

"(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

"(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

"(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

"(4) to encourage and assist the development and operation of regional air pollution control programs.

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[1] Clean Air Act (42 U.S.C. 1857 et seq.) includes the Clean Air Act of 1963 (P.L. 88-206), and amendments made by the Motor Vehicle Air Pollution Control Act —P.L. 89-272 (October 20, 1965), the Clean Air Act Amendments of 1966—P.L. 89-675 (October 15, 1966), the Air Quality Act of 1967—P.L. 90-148 (November 21, 1967), the Clean Air Amendments of 1970—P.L. 91-604—(December 31, 1970), the Comprehensive Health Manpower Training Act of 1971—P.L. 92-157—(November 18, 1971), and the Energy Supply and Environmental Coordination Act of 1974—P.L. 93-319—(June 22, 1974).

Marginal brackets indicate revisions.

AIR QUALITY CONTROL REGIONS

"SEC. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

"(b) For purposes of developing and carrying out implementation plans under section 110—

"(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after such date under subsection (c), shall be an air quality control region; and

"(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

"(c) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

AIR QUALITY CRITERIA AND CONTROL TECHNIQUES

"SEC. 108. (a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

"(A) which in his judgment has an adverse effect on public health and welfare;

"(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

"(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

"(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

"(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

"(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

"(C) any known or anticipated adverse effects on welfare.

"(b)(1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies, information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on attainable technology and alternative methods of

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prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination of significant reduction of emissions.

"(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator, information related to that required in paragraph (1).

"(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

"(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

NATIONAL AMBIENT AIR QUALITY STANDARDS

"SEC. 109. (a)(1) The Administrator

"(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

"(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

"(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

"(b)(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

"(2) Any national secondary ambient air quality standard prescribed, under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

IMPLEMENTATION PLANS

"SEC. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

"(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

"(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

"(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

"(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

"(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under Section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

"(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed eighteen months from the date otherwise required for submission of such plan.

"(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

"(A) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

"(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

"(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

"(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

"(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

"(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

"(D) For purposes of this paragraph—

"(i) The term 'parking surcharge regulation' means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

"(ii) The term 'management of parking supply' shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

"(iii) The term 'preferential bus/carpool lane' shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

"(E) No standard, plan, or requirement, relating to manage-

ment of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

"(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

"(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

"(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

"(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

"(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

"(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and

"(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

"(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

"(A) good faith efforts have been made to comply with such requirement before such date,

"(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been

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available for a sufficient period of time,

"(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

"(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

"(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

"(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

"(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

"(D) Section 307 (a) (relating to subpenas) shall be applicable to any proceeding under this subsection.

FEDERAL ENFORCEMENT

"SEC. 113. (a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

"(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding, (A) during the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement') (B) the Administrator may enforce any requirement of such plan with respect to any person—

"(A) by issuing an order to comply with such requirement, or

"(B) by bringing a civil action under subsection (b).

"(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards) or 112(c) (relating to standards for hazardous emissions), or 119(g) (relating to energy-related authorities), or is in violation of any requirement of section 114 (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b).

"(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

"(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

"(1) violates or fails or refuses to comply with any order issued under subsection (a); or

"(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of a finding that such person is violating such requirement; or

"(3) violates section 111(e), 112(c), or 119(g); or

"(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

"(c) (1) Any person who knowingly—

"(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

"(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

"(C) violates section 111(e), section 112(c), or section 119(g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

"(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

GENERAL PROVISION RELATING TO ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

"SEC. 307

"(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111 any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

"(c) In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

APPENDIX B

EPA GUIDELINES ON INFLATION IMPACT STATEMENTS

These guidelines provide for EPA compliance with Executive Order 11821 as implemented by OMB Circular No. A-107, which requires that inflationary impact must be evaluated for major legislative proposals, regulations, and rules. These guidelines shall be followed from the date of approval by OMB until the expiration of Executive Order 11821 (December 31, 1976, unless extended). All major legislative proposals, regulations, and rules must be evaluated for inflationary impacts, and each evaluation must be reported in an Inflation Impact Statement (IIS).

Criteria For Which Actions Require IIS's

1. Only major legislative proposals and proposal of regulatory actions which may have a significant impact on inflation will require preparation of an IIS. Interim final promulgation of major regulatory actions will require preparation of an IIS only if there has been no prior proposal of the action.
2. Proposal of new legislation or of standards and regulations shall be considered a major action and require an IIS if any of the following criteria are met:

a. Additional national annualized costs of compliance, including capital charges (interest and depreciation), will total $100 million within any calendar year by the attainment date, if applicable, or within five years of implementation.

b. Total additional costs of production of any major product is more than 5% of the selling price of the product.

c. Net national energy consumption will be increased by the equivalent of 25,000 barrels of oil a day (equal to 50×10^{12} BTU per year or 5×10^{9} kilowatt-hours per year).

d. Additional annual demands is created or annual supply is decreased by more than 3% for any of the following materials by the attainment date, if applicable, or within five years of implementation: plate steel, tubular steel, stainless steel, scrap steel, aluminum, copper manganese, magnesium, zinc, ethylene, ethylene glycol, liquified petroleum gases, ammonia, urea, plastics, synthetic rubber, pulp.

3. If estimates and comparisons show that the above criteria are not met or if in the absence of estimates one can safely judge that they are not met, then the action is not considered major; and an IIS need not be prepared.

4. Where cost estimates cannot be made due to the nature of the action involved (e.g., nondegradation requirements under the Clean Air Act), an IIS need be prepared only if there is a reasonable probability that the criteria such as those above might be met or if the Agency determines that there is a reasonable probability of major economic impact.

5. EPA approvals of State actions do not require IIS's, although EPA actions in lieu of disapproved State actions may require them if the above criteria are met. Approval of State actions will require an IIS only in the special case where the Council on Wage and Price Stability demonstrates that the action is effectively an EPA action and the action meets the other criteria for major actions. EPA stipulation of minimal acceptable State actions does not necessarily make a State action effectively an EPA action.
6. An IIS does not have to be prepared to accompany an Advanced Notice of Proposed Rule-Making (ANPRM), although a subsequent proposal may require an IIS.
7. Individual actions on permits, compliance schedules, or formal enforcement actions do not require IIS's.
8. Funding of existing legislative programs (e.g., construction grants program) does not require an IIS.
9. Actions which only serve to enforce prior legislation or regulations, without themselves levying significant new spending requirements, will not require IIS's.

Form and Content of IIS's

1. An Inflation Impact Statement shall consist of a brief summary of the results of the analysis done to evaluate the inflationary and other economic impacts of the action and shall reference documentation of the full analysis.
2. The IIS should include estimates of the following:
   a. Incremental costs of compliance, both capital, and annual costs.
   b. A description of whom these costs directly impact.

c. Direct effects on prices of goods whose production processes are affected.

d. Productivity effects (such as production of goods, employment, plant closings or curtailment, industry growth).

e. Indirect effects (such as price changes for other goods, balance of payments, regional impacts, investments in non-environmental assets, effects on levels of taxes).

f. Impacts on energy use.

Where estimation of these effects is infeasible or impractical or where the effect is obviously insignificant, these items will be omitted.

3. In most cases, assessment of impact on inflation can be expressed in terms of estimated price changes for directly and indirectly impacted goods where these price effects are derived from analysis of the direct microeconomic impacts of increased costs or reduced output. The macroeconomic effect on aggregate price levels need only be estimated for actions requiring expenditures of $5 billion or more within a five-year time period.

4. The environmental improvement resulting from the action should be identified and, if possible, quantified. Valuation of these improvements in dollar terms can be done in those instances where such valuation is deemed feasible and meaningful, given the limitations in the state-of-the-art of benefits assessment of pollution control. It is recognized that in most cases this type of valuation will not be feasible or meaningful.

5. Alternatives that have been considered should be identified, along with costs, impacts, and environmental improvements projected for these alternatives.

6. Where the nature of the action involved prevents quantification of economic impacts (e.g., requirements for development of State plans), but where major economic impacts are possible, the nature of the potential impacts should be discussed qualitatively or descriptively (with cost estimates limited perhaps to unit costs or examples).
7. For those cases where only the energy use criterion is exceeded, the IIS can be limited to energy considerations.

Procedures for Development and Use of IIS's

1. Preparation of IIS's is the responsibility of the lead office involved in preparation of legislative proposals or rule-making packages, although working group assistance with this development may be appropriate.
2. The IIS for each major standard and regulation will undergo internal review along with the rest of the rule-making package as part of the Steering Committee process. Tentative plans to prepare or not to prepare an IIS should be stated in the development plan for each standard.
3. The preamble of the Federal Register notice for each major standard or regulation, as defined by the above criteria, must contain the following language immediately above the Administrator's signature: "It is hereby certified that the economic and inflationary effects of this proposal have been carefully evaluated in accordance with Executive Order 11821." Other standards and regulations need not be accompanied by such a certification.
4. At the time that proposal of major legislation of standards and regulations undergoes inter-agency review, an IIS must have been completed.

5. IIS's for major legislative proposals will be furnished with supporting documentation to the Congress after the proposal is forwarded to the Congress.
6. At the time of publication of each proposed standard or regulation, the IIS should be sent along with a copy of the standard to the Council on Wage and Price Stability.
7. After public announcement of major legislative proposal or after Federal Register notice of proposal of major standards, the IIS must be made available for public perusal in the Public Information Reference Unit.
8. For each regulation requiring both an Environmental Impact Statement (EIS) and Inflation Impact Statement (IIS), the IIS can be used to fulfill the economic requirements of the EIS, thus avoiding the need to package the same material two different ways.